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In the Supreme Court of the United States

OCTOBER TERM, 1958

RAYMOND JEREAN KOLLER AND MARTIN SILVERBROOK,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the district court denying petitioner Silverbrook's motion to dismiss (R. 10–11) is reported at 143 F. Supp. 154, *sub nom. United States* v. *Doman*. The memorandum opinion of the district court granting the Government's motion for summary judgment against petitioner Silverbrook (R. 17) is not reported. The short memorandum opinion of the district court with respect to its order (R. 17) granting the Government's motion for summary judgment against petitioner Koller was not reported and is not included in this record. The opinion of the court of appeals (R. 19–24) is reported at 255 F. 2d 865.

JURISDICTION

The judgments of the court of appeals were entered on June 17, 1958 (R. 24–25). The petition for a writ of certiorari was filed on September 13, 1958, and was granted on November 17, 1958 (R. 26). 358 U.S. 892. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the remedy provided by Section 26(b)(1) of the Surplus Property Act, permitting the Government to recover $2,000 for each violation of the Act plus double the amount of any damage sustained as a result of the violation, is an indemnification of the Government for its loss or a "civil fine, penalty, or forfeiture" to which the five-year limitation period of 28 U.S.C. 2462 is applicable.

STATUTES INVOLVED

Section 26(b) of the Surplus Property Act of 1944, 58 Stat. 765, 780, 50 U.S.C. App. (1946 ed.) 1635(b), now codified as Section 209(b) of the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, 392, 40 U.S.C. 489(b), provides in pertinent part as follows:

> (b) Every person who shall use or engage in, or cause to be used or engaged in, or enter into an agreement, combination, or conspiracy to use or engage in or to cause to be used or engaged in, any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Federal agency in connec-

tion with the procurement, transfer, or disposition of property hereunder—

(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the cost of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by the United States or any Federal agency to such person or by such person to the United States or any Federal agency, as the case may be; or

(3) shall, if the United States shall so elect, restore to the United States the money or property thus secured and obtained and the United States shall retain as liquidated damages any property, money, or other consideration given to the United States or any Federal agency for such money or property, as the case may be.

28 U.S.C. 2462 provides as follows:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

STATEMENT

This is a civil action instituted by the United States pursuant to Section 26(b)(1) of the Surplus Property

Act of 1944 (*supra,* pp. 2–3) to recover from the defendants double damages plus $2,000 for each fraudulent violation of the Act (R. 5–8).

The Government instituted this action against petitioners and ten other defendants on May 12, 1955 (R. 1). The amended complaint alleged that petitioners had made false and fraudulent statements of material facts in their applications for veterans' priority certificates (R. 7). The gravamen of the Government's allegations was that petitioners had served as front men to obtain for a non-veteran named Shneer surplus property to which Shneer was not otherwise entitled (R. 5–8). Specifically, the complaint charged that petitioners had stated in their applications for priority certificates their intention to purchase surplus property for their own use, while in fact they were acting at the instance and on behalf of Shneer (R. 7). Pursuant to this scheme, petitioners purchased various trucks, busses and cars which were selected by the non-veteran for his use. The fraudulent applications were filed by petitioners—two by Koller and one by Silverbrook—in 1945 and 1946 (R. 9). The complaint sought double damages plus $2,000 for each fraudulent act, together with costs (R. 8).

Petitioner Silverbrook filed a motion to dismiss on the ground that the action was barred by the statute of limitations provided in 28 U.S.C. 2462, *supra,* p. 3, applicable to "any civil fine, penalty, or forfeiture" (R. 10). The district court denied this motion on the ground that the recovery under Section 26(b)(1) was compensatory and that therefore 28 U.S.C. 2462 had no application to this suit.

The Government then filed motions for summary judgment against Koller and Silverbrook (R. 13–16). These motions were based on the fact that in 1950 petitioners had pleaded guilty to indictments charging them with violating 18 U.S.C. (1946 ed.) 80 (R. 15–16). The violations there charged were based on the identical transactions constituting the basis for recovery in the instant action (R. 15–16). Petitioners resisted this motion, relying only on the contention, previously raised and decided against Silverbrook, that these actions were barred by the statute of limitations in 28 U.S.C. 2462. The district court granted both of the Government's motions for summary judgment, awarding it $2,000 against petitioner Silverbrook for one violation of this Act and $4,000 against petitioner Koller for two violations of the Act (R. 17).

On appeal, the court below unanimously affirmed, holding that the recovery permitted by Section 26 (b)(1) is compensatory, not penal, and that therefore the five-year statute of limitations in 28 U.S.C. 2462 is inapplicable to this action (R. 19–24).

SUMMARY OF ARGUMENT

I

As both courts below held, the remedy provided by Section 26(b)(1) of the Surplus Property Act is compensatory and intended to insure the Government full restitution for its loss. Accordingly, the statute o flimitations contained in 28 U.S.C. 2462, *supra*, p. 3, dealing with civil fines, penalties and forfeitures, is not applicable to this suit under Section 26(b)(1).

This holding is compelled by this Court's opinion in *Rex Trailer Company* v. *United States*, 350 U.S. 148. That case also involved a suit under Section 26(b)(1) of the Surplus Property Act. The defendant contended that the action was barred by the double jeopardy clause of the Fifth Amendment because he had earlier been prosecuted criminally for the same transactions. The Court rejected this contention on the ground that the later action under Section 26(b)(1) was compensatory and therefore not barred by the double jeopardy clause. The Court stated, "The Government's recovery here is comparable to the recovery under liquidated-damage provisions which fix compensation for anticipated loss", 350 U.S. at 153.

Although the question in *Rex Trailer* as to the nature of the remedy under Section 26(b)(1) arose in the context of the double jeopardy clause, it is clear that the Court was aware of the potential application of its decision to the statute of limitations issue involved here. Indeed, the Court granted certiorari for the avowed purpose of resolving a conflict between circuits in cases involving the application of the statute of limitations in 28 U.S.C. 2462 to suits under Section 26(b)(1) of the Surplus Property Act (350 U.S. at 149). In one of these cases, the remedy provided by Section 26(b)(1) was held to be compensatory; in the other, penal. The present petitioners now take the position that the Court did not in *Rex Trailer* resolve the conflict which occasioned the grant of certiorari, despite the clear holding in that case that Section 26(b)(1) was intended to be, and is, compensatory.

II

The considerations which motivated the Court in *Rex Trailer,* we believe, will lead the Court to the same conclusion here. As a result of petitioners' fraudulent activities, the Government has suffered considerable damage, the extent of which it is difficult, if not impossible, to ascertain with any precision. Petitioners' fraud has precluded the Government from making bona fide sales to veterans; it has decreased the number of vehicles potentially available to Government agencies; and it has tended to promote undesirable speculation. Not only was the Government tricked into selling its vehicles to those with whom it specifically did not wish to deal, but also it was tricked into selling them at a price which had been established only for priority purposes. These injuries, while quite real, are impossible to reduce to an exact monetary amount. In these circumstances, liquidated damages are particularly appropriate. See, *e.g., Priebe & Sons v. United States,* 332 U.S. 407, 411–412.

An examination of the alternative measures of damages provided by Section 26(b) also indicates that Congress intended the remedy in Section 26(b)(1) as compensatory in the nature of liquidated damages. Subparagraphs 2 and 3, which contain alternative provisions for multiple damages, are specifically designated by the statute "as liquidated damages". Section 26(b) (2) and (3). As this Court stated in *Rex Trailer,* "the conclusion is inescapable that each [of these subsections] was of the same nature and designed to serve the same purpose", 350 U.S. at 151–152. As

subsections 2 and 3 are incontestably compensatory, it must follow that subsection 1 is also compensatory.

Additional internal evidence indicates that Congress did not consider the limitations provision of 28 U.S.C. 2462 applicable to an action under Section 26(b)(1). At the time the Surplus Property Act was enacted, Congress was aware of the necessity of suspending statutes of limitations during the war. Otherwise an applicable statute of limitations might run while the country was preoccupied with the war effort. See S. Rept. No. 1057, 78th Cong., 2d Sess., p. 14. To deal with this situation, Congress included Section 28 in the Surplus Property Act (58 Stat. 765, 781, 50 U.S.C. App. (1946 ed.) 1637) amending a provision of the Criminal Code (18 U.S.C. 590a) so that limitations on criminal violations of the Surplus Property Act would be suspended until three years after the termination of hostilities. By contrast, Congress provided no suspension of limitations on civil actions under Section 26, despite its awareness of the problem and of the necessity for suspending all applicable statutes of limitations. The implication to be drawn from this legislative history is that Congress did not consider any statute of limitations to be applicable to actions under Section 26(b).

The conclusion that the remedy in Section 26(b)(1) is compensatory is confirmed by a number of cases which have so construed similar statutes. An almost identical section in the False Claims Act (31 U.S.C. 231) has been held by this Court to be compensatory, and "to provide for restitution to the government of

money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole." *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537, 551–552. The statute of limitations involved in this action, 28 U.S.C. 2462, has also been held inapplicable to actions for double and treble damages under a variety of statutes. *E.g., Chattanooga Foundry* v. *Atlanta,* 203 U.S. 390, and *Keen* v. *Mid-Continent Petroleum Corp.,* 58 F. Supp. 915 (N.D. Iowa), affirmed, 157 F. 2d 310 (C.A. 8); see also *Overnight Motor Co.* v. *Missel,* 316 U.S. 572.

ARGUMENT

The sole issue presented by this case is whether the five-year statute of limitations in 28 U.S.C. 2462 (*supra,* p. 3), applicable to a "civil fine, penalty, or forfeiture," governs an action under Section 26 (b)(1) of the Surplus Property Act.[1] Whether the statute of limitations is applicable to an action under Section 26(b)(1) depends, in turn, on whether the remedy provided by that Section was intended by Congress to be, and is, compensatory. Both petitioners and the Government are in agreement that if the remedy provided by Section 26(b)(1) is compensatory, it is not a "civil fine, penalty, or forfeiture" to which alone the statute of limitations in 28 U.S.C. 2462 applies (Pet. Br. 7–9). In Point I, we show that this Court has already decided that the recovery

[1] There is no statute of limitations applicable generally to civil suits by the United States which do not involve a "civil fine, penalty, or forfeiture."

in Section 26(b)(1) is compensatory. In Point II, we examine many of the considerations which led the Court earlier to decide that Section 26(b)(1) is compensatory and demonstrate that these considerations again lead to the same conclusion.

I

THE COURT HAS ALREADY HELD IN *Rex Trailer Co. v. United States*, 350 U.S. 148, THAT THE RECOVERY PROVIDED IN SECTION 26(B)(1) OF THE SURPLUS PROPERTY ACT OF 1944 IS COMPENSATORY

The identical issue in dispute here was briefed, argued, and resolved by this Court in *Rex Trailer Co. v. United States*, 350 U.S. 148. In *Rex Trailer*, the Government sought damages under the same section of the Surplus Property Act [illegible] proceeding the Government had obtained a conviction against that defendant based on the transactions for which suit was later brought under Section 26(b)(1). The defendant contended that the action under Section 26(b)(1) placed it twice in jeopardy in violation of the Fifth Amendment.

In rejecting this contention, the Court held that the action under Section 26(b)(1) was not criminal because the remedy there provided was in the nature of liquidated damages intended completely to indemnify the United States for its loss. The Court stated its conclusion in clear and unequivocal language (350 U.S. at 151, 153):

> We conclude that the recovery here is civil in nature. The Government has the right to make contracts and hold and dispose of property, and, for the protection of its property

> rights, it may resort to the same remedies as a private person. *Cotton* v. *United States,* 11 How. 229. Liquidated damages are a well-known remedy, and in fact Congress has utilized this form of recovery in numerous situations. In all building contracts, for example, Congress has required the insertion of a liquidated-damage clause which "shall be conclusive and binding upon all parties" without proof of "actual or specific damages sustained * * *." 32 Stat. 326, 40 U.S.C. § 269. Liquidated-damage provisions, when reasonable, are not to be regarded as penalties, *United States* v. *United Engineering & Contracting Co.,* 234 U.S. 236, 241, and are therefore civil in nature.
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> * * * The Government's recovery here is comparable to the recovery under liquidated-damage provisions which fix compensation for anticipated loss. As this Court recognized in *Priebe & Sons* v. *United States,* 332 U.S. 407, 411–412, liquidated damages "serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable, as is the case in many government contracts * * *."

In reaching this conclusion, the Court relied heavily on its earlier decision in *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537, which involved a provision of the False Claims Act, 31 U.S.C. 231, essentially the equivalent of Section 26(b)(1) of the Surplus Property Act.[2] In *Marcus* the defendant also contended that

[2] The False Claims Act provides that the defrauded "shall forfeit and pay to the United States the sum of $2,000, and, in

the double jeopardy clause of the Fifth Amendment forbade a suit under the False Claims Act after his prior conviction in a criminal action based on the same transactions. This contention was rejected. The holding of the case was succinctly stated by the Court in *Rex Trailer:* "[*Marcus*] *held* that the statute involved was *remedial* and *not penal*" (350 U.S. at 152. (Emphasis added.) By way of emphasis, the Court in *Rex Trailer* spoke of *Marcus* as "holding this provision to provide a *compensatory* civil remedy" (350 U.S. at 152, n. 4). (Emphasis added.) The Court concluded in *Rex Trailer* that the recovery under Section 26(b)(1) of the Surplus Property Act, as under the False Claims Act, was remedial and compensatory, and that accordingly the double jeopardy clause did not prevent the maintenance of the suit. It is therefore clear that the very question involved in the instant suit has already been decided by this Court in *Rex Trailer.*

Petitioners in the instant case attempt to distinguish *Rex Trailer* on the ground that it involved the application of the double jeopardy clause rather than the application of the statute of limitations in 28 U.S.C. 2462 (Pet. Br. 17–19). However, in determining the nature of the recovery in Section 26(b)(1), the Court in *Rex Trailer* was mindful of the reach of its decision to the statute of limitations situation. Indeed, the Court granted certiorari "to re-

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addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

solve an asserted conflict between the decisions of the Courts of Appeals" (350 U.S. at 149), a conflict not between cases involving double jeopardy, but a conflict involving the application of the statute of limitations in 28 U.S.C. 2462 to actions under Section 26(b)(1) of the Surplus Property Act. As the Court itself described the conflict (350 U.S. at 149):

> In considering whether the statute of limitations contained in 28 U.S.C. § 2462 applied to § 26(b)(1) of the Surplus Property Act, the Fifth Circuit held § 26(b)(1) to be a civil remedy in *United States* v. *Weaver*, 207 F. 2d 796, 797, and the Sixth Circuit held it to be penal in *United States* v. *Witherspoon*, 211 F. 2d 858.

Yet, petitioners now argue that this Court failed to resolve the very conflict which occasioned the grant of certiorari in *Rex Trailer*, a contention patently without merit.

Petitioners also suggest that the statements in *Rex Trailer* holding the recovery under Section 26(b)(1) compensatory and remedial rather than penal should now be disregarded because they are mere dicta, not required by the holding in the case (Pet. Br. 19, 26). However, as the quotations from *Rex Trailer* set out above (pp. 10–12) amply demonstrate, the holding that Section 26(b)(1) is compensatory and remedial is an integral part of the decision. The Court did not reason that the recovery under Section 26(b)(1) was civil, even if penal, and therefore not criminal. The Court reasoned that the recovery was compensatory and remedial, and therefore not criminal. Thus, the

Court's statements that the recovery under Section 26(b)(1) is compensatory and remedial are not mere gratuitous observations, but contain the basic rationale of the decision. The words of Justice Frankfurter dissenting in *Darr* v. *Burford*, 339 U.S. 200, 225–226, are apt:

> Opinions are required in our legal system in order that the reasoning which justifies a conclusion may be made manifest. The disclosure of the reasoning by which a conclusion is reached cannot remotely be deemed dictum. A decision implies the process of reasoning which requires it.

That the Court might possibly have arrived at its decision by another route and on another basis does not transform the rationale chosen by the Court into gratuitous dictum. See *Union Pacific Co.* v. *Mason City Co.*, 199 U.S. 160, 166; *Railroad Companies* v. *Schutte*, 103 U.S. 118, 143. Cf. *United States* v. *Puff*, 211 F. 2d 171, 183–184 (C. A. 2), certiorari denied, 347 U.S. 963.

Finally, with the exception of the Court of Claims,[3] the courts considering the problem have concluded that *Rex Trailer* held that the statute of limitations

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[3] In *Erie Basin Metal Products* v. *United States*, 150 F. Supp. 561 (C. Cls.) and *Goggin* v. *United States*, 152 F. Supp. 78 (C. Cls.), the Court of Claims held that the statute of limitations in 28 U.S.C. 2462 was applicable to counterclaims filed by the Government under the Contract Settlement Act, 41 U.S.C. 119, the damage provision of which is substantially like that in Section 26(b)(1) of the Surplus Property Act. Neither of these decisions has yet become final because both involved counterclaims by the United States in suits in which the affirmative claim against the Government is still pending. It is for this reason that the Government has not petitioned for certiorari.

in 28 U.S.C. 2462 was inapplicable to a suit under Section 26(b)(1) of the Surplus Property Act. *E.g.*, *Daniel* v. *United States*, 234 F. 2d 102 (C.A. 5), certiorari denied, 352 U.S. 971; *United States* v. *Schneider*, 139 F. Supp. 826 (S.D. N.Y.); and *United States* v. *Hougham*, 148 F. Supp. 715 (S.D. Cal.) (on appeal to C.A. 9). See also *United States* v. *Barish*, 256 F. 2d 571 (C.A. 3).

In short, on the authority of *Rex Trailer*, petitioners' position here should be rejected.

II

A RE-EXAMINATION OF THE NATURE OF THE REMEDY PROVIDED BY SECTION 26(B)(1) WILL AGAIN DEMONSTRATE THAT IT IS, AND WAS INTENDED TO BE, COMPENSATORY AND NOT PENAL

As we have shown in the preceding point, *Rex Trailer* has conclusively decided the sole issue presented by the instant case. However, if the Court chooses to re-examine the rationale of *Rex Trailer*, we urge that the recovery provided by Section 26(b)(1) of the Surplus Property Act is, and was intended to be, compensatory.

1. A review of the statutory background is helpful. Section 26(b) of the Surplus Property Act of 1944 (*supra*, pp. 2–3), pursuant to which this action was brought, grants to the United States three alternative civil remedies against "Every person who shall use or engage in * * * any fraudulent trick, scheme, or device, for the purpose of securing or obtaining * * * for any person any payment, property, or other benefits from the United States or any Federal agency in connection with the procurement, transfer, or disposition of property hereunder * * *." The three alterna-

tive remedies provided by Section 26(b) are: (1) $2,000 for each fraudulent act plus twice the amount of any damages sustained plus the cost of suit; (2) twice the consideration which the purchaser agreed to pay for the property fraudulently obtained; or (3) the return of the property, allowing the Government to keep the full consideration paid by the fraudulent purchaser. See S. Rept. No. 1057, 78th Cong., 2d Sess., p. 14.

The objectives of the Surplus Property Act of 1944 (58 Stat. 765) were to facilitate and regulate the orderly disposal of surplus property (Section 2, 58 Stat. 766, 50 U.S.C. App. (1946 ed.) 1611) while giving effect to twenty enumerated purposes, including (d) the discouragement of monopolistic practices and the preservation of small business, (f) the giving of an opportunity to returning veterans to establish themselves in business, agriculture, or professional life, (h) the discouragement of disposal of surplus property to speculators, (q) the prevention of the making of unusual and excessive profits, and (t) the securing to the United States as nearly as possible the fair value of property disposed of under the Act, except when otherwise provided.

In order to carry out the statutory purpose of assisting veterans, Section 16 of the Act (58 Stat. 773, 50 U.S.C. App. (1940 ed., Supp. V) 1625) authorized the Surplus Property Board [4] to prescribe regulations

[4] The Surplus Property Board was abolished and its functions were transferred to the Surplus Property Administration and the Surplus Property Administrator, respectively, by the Act of September 18, 1945, 59 Stat. 533, 50 U.S.C. App. (1946 ed.) 1614a, 1614b. Executive Order No. 9689 of January 31, 1946 (11 F.R. 1265), transferred these functions first to the War

"to aid veterans to establish and maintain their own small business, professional, or agricultural enterprises, by affording veterans suitable preferences * * *." The actual operation of the statute, however, disclosed that this section was of little value to veterans since federal and state agencies enjoying priorities under Sections 12 and 13 higher than veterans (58 Stat. 770, 50 U.S.C. App. (1940 ed., Supp. V) 1621, 1622) absorbed virtually all the surplus property in which veterans were interested.[5] Congress, consequently, amended the Surplus Property Act in 1946 (60 Stat. 168, 50 U.S.C. (1946 ed.) 1625) by giving veterans a priority surpassed only by that of the Federal Government. In addition, the administrator[6] was authorized to—

> * * * set aside or otherwise * * * [make] available quantities and types of any surplus property, except real property, which he determines to be appropriate for *exclusive disposal* to veterans for their own personal use, and to enable them to establish and maintain their *own*

Assets Corporation and, effective March 25, 1946, to the War Assets Administration and the War Assets Administrator. Reorganization Plan No. 1 of 1947, Sec. 501, 61 Stat. 952, transferred these functions back to the Surplus Property Administration and the Surplus Property Administrator, changing their names, however, to the War Assets Administration and War Assets Administrator, respectively. The Federal Property and Administrative Services Act of 1949, Sec. 105 (63 Stat. 381, 5 U.S.C. 630c), finally placed these functions in the hands of the General Services Administration and the Administrator of General Services, respectively.

[5] Cf. S. Rept. No. 1142, 79th Cong., 2d Sess., and H. Rept. No. 1954, 79th Cong., 2d Sess.; 92 Cong. Rec. 4001.

[6] See fn. 4, p. 16, *supra*.

small business, professional, or agricultural enterprises. [Emphasis added.]

Property thus set aside for veterans enjoyed a superpriority surpassing even that of the United States.[7]

This preference was of great value to veterans, not only because it entitled them to acquire the property at an attractive price and on favorable credit terms,[8] but also because it enabled them to acquire those items which were in short supply. In 1946, the United States was still in the midst of reconversion, and surplus property sales were the only source from which many goods could be acquired.[9] As had been intended by Congress,[10] motor vehicles, the subject matter of the sales in this case, made up a large portion of the

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[7] S. Rept. No. 1142, 79th Cong., 2d Sess., p. 3, listed the priorities as follows:

1. Property set aside for veterans.
2. Federal Government.
3. Veterans generally.
4. Small business.
5. States and their political subdivisions and instrumentalities.

[8] 32 C.F.R. (1946 Supp.) 8302.8(d), 8302.11. The latter regulation provided:

"Disposal agencies shall fix the fair value at which property shall be acquired by priority claimants. *Such a fair value shall not be greater than the lowest price which is offered to any trade level at the time of acquisition* by the priority claimant, or where the fair value is fixed after examining competitive bids, it shall not be greater than the lowest acceptable bid." (Emphasis added.)

[9] See *e.g.*, H. Rept. No. 1954, 79th Cong., 2d Sess., p. 2; cf. Quarterly Progress Report to the Congress by the War Assets Administration, Second Quarter of 1946, p. 19.

[10] See H. Rept. No. 1954, 79th Cong., 2d Sess., p. 2; 92 Cong. Rec. 4001, 4002.

surplus property set aside for exclusive use for veterans."

2. The difficulties Congress faced in insuring that the Government would be fully compensated for its losses and the damage to its program resulting from fraudulent violations of the Surplus Property Act go a long way toward establishing the compensatory nature of the three alternative remedies provided by Section 26(b). Among the stated purposes of the Surplus Property Act were: to aid veterans in re-establishing themselves in civilian life; to provide for the disposal of billions of dollars of property without undue dislocation of the economy; and, at the same time, to preserve small business and discourage monopoly. What measure of damage would compensate the Government for impediments to these objectives? Only by providing the Government with alternative remedies which go beyond specifically provable damages could the Government be assured full compensation.

As this Court recognized in *Rex Trailer* (350 U.S. at 153–154):

> It is obvious that injury to the Government resulted from the Rex Trailer Company's fraudulent purchase of trucks. It precluded bona fide sales to veterans, decreased the number of motor vehicles available to Government agencies, and tended to promote undesirable speculation. The damages resulting from this injury may be difficult or impossible to ascertain, but it is the function of liquidated dam-

[11] Schedule of Property to be set aside for veterans. Exhibit A following 32 C.F.R. (1946 Supp.) 8302.14.

> ages to provide a measure of recovery in such circumstances. On this record it cannot be said that the measure of recovery fixed by Congress in the Act is so unreasonable or excessive that it transformed what was clearly intended as a civil remedy into a criminal penalty.

Thus, the provision in Section 26(b)(1) allowing the Government to recover $2,000 for each violation of the Act plus double damages is not intended to punish the wrongdoers, but rather is a provision in the nature of liquidated damages attempting to estimate in advance what will constitute the Government's losses.

In order to help certified veterans in their readjustment to civilian life, the Government was willing to sell these vehicles to them at a price substantially lower than that which the vehicles would bring in the open market. See *supra*, p. 18, fn. 8. But the Government was *not* willing to sell these motor vehicles generally to those not entitled to priority, and even if it were, there is no indication that it would have been willing to sell the vehicles generally at the same price and under the same conditions. In these circumstances, petitioners' fraudulent misrepresentations had the effect not only of inducing the Government to sell the vehicles to persons with whom it had no intention of dealing, but also of selling the vehicles at lower than market prices to a person not entitled to priority. Plainly, this caused damage to the Government and its interests, and hindered the fulfillment of the high aims Congress set for the Surplus Property Act.

In addition, by fraudulently procuring the vehicles, petitioners reduced the number of surplus vehicles in the hands of the War Assets Administration. As a result, some Government agency which was entitled to priority may very well have been compelled to purchase vehicles at the higher market price. While Congress was agreeable to that result as far as veterans were concerned, it intended that Government agencies have top priority—after veterans—to guard against precisely such a result so far as other purchasers were concerned.[12] As stated in S. Rept. No. 1142, 79th Cong., 2d Sess., on the bill which set up the present priorities (at pp. 1–2):

> The committee amendment still continues the general first priority extended to Government agencies [in sales not exclusively for veterans]. It should be noted that the purpose of this priority is to save the Government money where one Government agency has surplus equipment which another Government agency requires for the discharge of its responsibilities. If the veterans' preference were advanced to outrank the Federal Government priority, the Federal Government might be compelled in many instances to purchase in the open market the same or similar goods as those which were disposed of as surplus by the War Assets Administration.

Petitioners' frauds had the effect of reducing the number of vehicles available to priority holders, including Government agencies, and might well have caused damage to the Government on this score.

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[12] For the order of priority, see fn. 7, *supra*, p. 18.

Finally, the Government is entitled not only to recover its losses from the sales themselves, but also to reimbursement of the costs incurred in connection with ferreting out and investigating the frauds. See, *e.g., Helvering* v. *Mitchell,* 303 U.S. 391. In that case, this Court held that the 50% additional tax imposed in tax fraud cases was remedial in nature and intended "to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud" (303 U.S. at 401). See also *Stockwell* v. *United States,* 13 Wall. 531, 547, 551; *Scadron's Estate* v. *Commissioner,* 212 F. 2d 188 (C.A. 2), certiorari denied, 348 U.S. 832.

Thus, although the Government had been damaged in the instant case, it was difficult, if not impossible, to reduce the injury to a monetary equivalent. This does not mean, however, that the exaction of the prescribed sum of $2,000 for each violation is a provision for a penalty. On the contrary, the fact that there is no exact or measurable monetary damage is the *raison d'etre* for the damage formulae of Section 26(b). As was observed by the Court in *Rex Trailer* (350 U.S. at 153):

> * * * The Government's recovery here is comparable to the recovery under liquidated-damage provisions which fix compensation for anticipated loss. As this Court recognized in *Priebe & Sons* v. *United States,* 332 U.S. 407, 411–412, liquidated damages "serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable * * *."

And the Court concluded with respect to the substantially identical damage provision in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537:

> * * * We cannot say that the remedy now before us requiring payment of a lump sum [of $2,000] and double damages will do more than afford the government complete indemnity for the injuries done it. [317 U.S. at 549.]
>
> * * * * *
>
> * * * We think the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole. * * * The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress. [317 U.S. at 551–552.]

3. That Congress intended the remedy in Section 26(b)(1) to be compensatory is confirmed by an examination of the alternative civil remedies in Section 26(b) (2) and (3), which provide that those who violate the Act:

> (2) shall, if the United States shall so elect, pay to the United States, *as liquidated damages*, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or
>
> (3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain *as liquidated damages* any consideration given to the United States or any

> Government agency for such property. [Emphasis added.]

It will be noted that these alternatives, although not dissimilar to Section 26(b)(1), and, like it, providing for multiple damages, are specifically designated "liquidated damages". It would be difficult to argue in face of this plain congressional designation that subsections (2) and (3) are anything but compensatory. Indeed, petitioners concede, as they must, that the remedies provided by subsections (2) and (3) were intended to be liquidated damages (Pet. Br. 10).

However, petitioners are then forced to take the position that in a single section, including three alternative civil remedies, Congress included two provisions intended to be compensatory and one intended to be punitive. But Congress would not have insinuated a punitive sanction as an alternative to two compensatory remedies in the same section. On the contrary, this juxtaposition makes it plain that Congress viewed all three subsections *in pari materia*. As stated in the Committee report, "the United States is given the option of electing among *three different measures of* damages * * *." S. Rept. No. 1057, 78th Cong., 2d Sess., pp. 13–14 [13] (Emphasis added.)

We can do no better than to quote the reasoning of this Court in *Rex Trailer* (350 U.S. at 151–152):

> These alternative remedies are set out in three consecutively numbered subsections of

[13] This Senate Report covers S. 2065. While the bill enacted was designated H.R. 5125, the Senate, after considering S. 2065, struck everything after the enacting clause of H.R. 5125 as it passed the House, and substituted therefore the text of the Senate bill, as amended. 90 Cong. Rec. 7330.

> § 26(b). All three were recognized as civil remedies by Congress before the bill was passed, and the conclusion is inescapable that each was of the same nature and designed to serve the same purpose.

See also *United States* v. *Rex Trailer Co.*, 218 F. 2d 880, 883 (C.A. 7); and the Court of Appeals opinion in the present case, 255 F. 2d 865, 868–869.

Accordingly, as subsections (2) and (3) were plainly intended to be compensatory, it must follow that the remedy provided by subsection (1) was intended to fall in the same category.

4. There is additional internal evidence in the Surplus Property Act that Congress considered 28 U.S.C. 2462 inapplicable to actions brought under Section 26(b)(1).

At the time the Surplus Property Act was enacted, the entire country was intensively preoccupied with the war effort. As a result of this preoccupation, there was a danger that any statute of limitations applicable to violations of the Surplus Property Act might run before a suit could be filed. Congress was acutely aware of this problem, as the committee report reflects:

> It is clear that the bulk of the offenses cognizable under this statute will not be apprehended or investigated until the end of the war and will then require considerable time before they advance to the stage of litigation. [S. Rept. No. 1057, 78th Cong., 2d Sess., p. 14.]

Therefore, Congress took great care to insure that violators of the Act did not escape punishment because of the country's preoccupation with the war.

At the time of the passage of the Act, a provision of the Criminal Code applicable to criminal prosecutions suspended the running of any statute of limitations against the United States until three years after the termination of hostilities in prosecutions involving "* * * defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner * * *", 58 Stat. 667.[14] Although this provision seemingly suspended the running of limitations against the United States in criminal prosecutions for violations of the Surplus Property Act, Congress nevertheless amended the provision by specifically adding violations of the Surplus

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[14] This suspension provision was originally enacted in 1942, Act of August 24, 1942, 56 Stat. 747, 18 U.S.C. (1940 ed., Supp III) 590a. Prior to the passage of the Surplus Property Act, this provision was amended on July 1, 1944 by Section 19 of the Contract Settlement Act, 58 Stat. 649, 667. At the time of the passage of the Surplus Property Act, Section 590a of Title 18 read as follows (58 Stat. 667):

"The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law."

Property Act to the list of prosecutions in which limitations were suspended by the statute. This amendment was made by Section 28 of the Surplus Property Act, 58 Stat. 765, 781, 50 U.S.C. App. (1946 ed.) 1637. Section 28, labeled "Amendment of section 590a of Title 18", reads as follows:

> The first section of the Act of August 24, 1942 (56 Stat. 747), as amended [Section 590a of Title 18], is amended to read as follows:
>
> "The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under the Surplus Property Act of 1944, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law."

As indicated by the history we have just set forth, this Section of the Surplus Property Act changed existing law by adding Clause 3 to then 18 U.S.C. 590a. See note to 18 U.S.C. (1946 ed.) 590a.

This evidences the extreme care which Congress took to insure that statutes of limitations applicable to criminal prosecutions for violations of the Surplus Property Act would be suspended until three years after the termination of hostilities. Indeed, Congress went so far as to enact an amendment to existing law which, on its face, might have been thought to be unnecessary.

Yet, despite the obvious care that Congress took to insure the suspension of limitations in criminal prosecutions, it provided no suspension of limitations with respect to civil actions under Section 26(b) of the Act. The conclusion is compelling: Congress did not suspend limitations on actions under Section 26(b) because it did not consider that any statute of limitations was applicable to an action under that Section. For Congress was clearly aware of the necessity for suspending any *applicable* statute of limitations. If a wartime suspension of limitations on criminal prosecutions was "necessitated by the magnitude of the operations involved under this act, and the intensive preoccupation of both participants and witnesses with the war effort," [15] this was equally true of civil actions under Section 26(b). The failure of Congress to provide for a suspension of limitations on actions under Section 26(b) can mean only that it did not

[15] S. Rept. No. 1057, 78th Cong., 2d Sess., p. 14.

consider any statute of limitations applicable to actions brought under that Section.

5. The conclusion that Section 26(b)(1) is compensatory is further buttressed by the fact that Congress has used similar measures of damages in other statutes which this and other courts have held to be compensatory and not subject to the statute of limitations in 28 U.S.C. 2462.

As we have already noted, the substantially identical provision of the False Claims Act, 31 U.S.C. 231, has been held by this Court to be compensatory in *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537. See also *United States ex rel. Ostrager* v. *New Orleans Chapter, Associated General Contractors,* 317 U.S. 562, which involved the same issue as *Marcus* v. *Hess,* and was disposed of on the authority of that case.

A statute allowing the Government to recover an additional 50% addendum to the assessed tax in cases where the deficiency was the result of fraud has been held, not a penalty, but rather a remedial measure intended to indemnify the Government for its loss. *Helvering* v. *Mitchell,* 303 U.S. 391. See also *Scadron's Estate* v. *Commissioner,* 212 F. 2d 188 (C.A. 2), certiorari denied, 348 U.S. 832.

Contrary to petitioners' contention that double damages are perforce a penalty (Pet. Br. 20) and that the treble damage provisions of the anti-trust laws are penal (Pet. Br. 11–13), it is established beyond doubt that such actions are *not* penal within the meaning of 28 U.S.C. 2462. Thus, this Court has held that the five-year statute of limitations provided by Rev. Stat.

§ 1047 [16] (the forerunner of 28 U.S.C. 2462) was inapplicable to an anti-trust action for treble damages, because such an action was a suit for compensatory relief. *Chattanooga Foundry* v. *Atlanta,* 203 U.S. 390; see also *Baush Mach. Tool Co.* v. *Aluminum Co. of America,* 63 F. 2d 778, 780 (C.A. 2). These cases have been followed since the enactment of 28 U.S.C. 2462 in its present form. See *Greene* v. *Lam Amusement Co.,* 145 F. Supp. 346, 348 (N.D. Ga.); and *Florida Wholesale Drug* v. *Ronson Art Metal Works,* 110 F. Supp. 573 (D.N.J.), both rejecting the contention that 28 U.S.C. 2462 is applicable to suits for treble damages under the anti-trust laws.[17]

To the same effect, the provision in the Fair Labor Standards Act allowing employees to recover double damages resulting from an employer's failure to pay the minimum compensation provided by the Act has been held compensatory and not within the scope of 28 U.S.C. 2462. *Keen* v. *Mid-Continent Petroleum Corp.,* 58 F. Supp. 915 (N.D. Iowa), affirmed, 157

[16] Rev. Stat. § 1047 provided as follows:

"No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued * * *."

Section 1047 was originally enacted in 1839 (Act of February 28, 1839, c. 36, § 4, 5 Stat. 322) and remained unchanged until 1948 when it was codified in its present form as 28 U.S.C. 2462 (Act of June 25, 1948, c. 646, 62 Stat. 974). The only change made in the section involved phraseology only, and did not affect the substance. H. Rept. No. 308, 80th Cong., 1st Sess., p. A191.

[17] None of the cases which petitioners cite involves the application of 28 U.S.C. 2462.

F. 2d 310 (C.A. 8); see also *Overnight Motor Co.* v. *Missel,* 316 U.S. 572. Similarly, Section 2462 has been held inapplicable to an action by seamen for double wages under Rev. Stat. § 4529. *Buckley* v. *Oceanic S.S. Co.,* 5 F. 2d 545 (C.A. 9).

In addition, this Court has upheld, as compensatory, statutes providing for a fixed sum as damages (*Atchison T. & S.F. Ry.* v. *Nichols,* 264 U.S. 348) and for a minimum amount of damages (*Brady* v. *Daly,* 175 U.S. 148; and *Woolworth Co.* v. *Contemporary Arts,* 344 U.S. 228).

Petitioners find the sole bit of support for their position from an ambiguous fragment of legislative history of the Act of June 25, 1948, 62 Stat. 869, which enacted the revised Judicial Code in Title 28. By this Act, Section 2461(a) was added to Title 28. It provides that:

> (a) Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action.

According to the committee report, the subsection was intended "to clarify a serious ambiguity in existing law" resulting from the fact that "[n]umerous sections in the United States Code prescribe civil fines, penalties, and pecuniary forfeitures for violation of certain sections without specifying the mode of recovery or enforcement thereof." H. Rept. No. 308, 80th Cong., 1st Sess., p. A190. The committee report then lists several examples of such statutes, but does not list either the Surplus Property Act, the False Claims Act,

or any statute providing a comparable recovery. However it does state that a "civil fine, penalty, or pecuniary forfeiture is recoverable in a civil action" (*Ibid.*).

One of the cases cited in support of this proposition is *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537. Whether the drafter of this report misread the *Marcus* case and erroneously concluded that it dealt with a civil penalty, as petitioners contend, or whether on the other hand the writer of the report was referring to the language in the *Marcus* case which indicates the Court's view that a civil penalty can be sued for a civil action (317 U.S. at 550), this ambiguous bit of legislative history, at best, can give petitioners little comfort. The nature of the remedy under the False Claims Act was a tangential consideration in the report. To conclude from a citation in a committee report that an earlier Congress had enacted a civil penalty in the Surplus Property Act would be to distort the process by which lawyers and courts determine congressional intent. This fleeting reference to *Marcus* v. *Hess,* without even a statement of the facts or the statute involved, cannot legitimately be magnified into an expression of the 80th Congress' understanding that Section 26(b)(1) of the Surplus Property Act, passed by an earlier Congress, is penal. See *Fogarty* v. *United States,* 340 U.S. 8, 13–14.[18] In any event, whatever small support this reference to

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[18] In a recent case, *Rainwater* v. *United States,* 356 U.S. 590, this Court stated at page 593: "At most, the 1918 amendment is merely an expression of how the 1918 Congress interpreted a statute passed by another Congress more than a half century before. Under these circumstances such interpretation has very little, if any, significance."

Marcus v. *Hess* gives to petitioners' position, it is dwarfed by the conclusive indications outlined earlier in this brief that the Congress which passed the Surplus Property Act intended the remedy in Section 26(b)(1) to be compensatory.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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